and reasonable compensation assessed at $300 per month for a period of twelve years' purchase. We agree that the sum of $62,300 is manifestly excessive. We set it aside accordingly and substitute it with the sum of $32,000.

Order accordingly.

Solicitors: *R.K. Nathan & Co.; Mariadass, Lock & Ainuddin.*

CHUNG HWA YING v. PHANG MUN MOOI & ANOR.

[S.C. (Abdul Hamid Ag. L.P., Seah & Syed Agil Barakbah S.C. JJ.) March 23 & April 23, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 171 of 1985]

Practice and Procedure – Accident claim – Failure of trial judge to consider relevant evidence – Whether appellate court justified in interfering with conclusion of trial judge on facts.

Evidence – Conclusion on facts by trial judge – Intervention by appellate court.

In this case the respondents were the administrators of the estate and for the benefit of the dependants of the motor accident involving a motor car which he was driving and which collided into a motor lorry driven by the appellant. The respondents' claim for damages was on behalf of the estate and for the benefit of the dependants of the deceased. The learned trial judge held both the appellant and the deceased equally to be blamed for the accident. The appellant appealed. The only issue relates to the question of liability.

Held, allowing the appeal: (1) in normal cases, the appellate court is reluctant to interfere with the Judge's conclusion on the facts because as a trial judge he had the opportunity to see and hear the witnesses and is in a better position to weigh their evidence;

(2) in the present appeal, however, the trial judge had failed to make proper use of this opportunity and has come to a wrong conclusion on the facts which in the circumstances necessitates the appellate court to interfere and prevent a miscarriage of justice;

(3) it is clear that the lorry in this case was at the material time travelling on its correct side of the road. The appellant had to keep to his side while following the slow moving bicycle in front as it was approaching the hump which probably concealed his view of oncoming traffic for a while. It was obvious from the evidence that the deceased was driving his car at a fast speed and lost control of it after it had skidded and in the result collided with the lorry and then two other vehicles and ended facing the way it came;

(4) the learned trial judge in this case had failed to test the evidence with the mute evidence *viz.*, the sketch plan, the photographs and the police reports.

SUPREME COURT.

S.K. Yeoh for the appellant.

Lal Harcharan Singh (*Gurdial Singh* with him) for the respondents.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): We allowed this appeal with costs here and the Court below and set aside the Order made by the learned trial Judge in favour of the plaintiffs/respondents. We also ordered the deposit to be refunded to the appellant. We indicated giving our reasons for allowing the appeal.

The respondents are the administrators of the estate of the deceased who died of injuries received in a motor accident on April 25, 1978, involving a motor car AU 6365 which he was driving and which collided into a motor lorry NE 5636 driven by the appellant. The respondents' claim for damages was on behalf of the estate and for the benefit of the dependants of the deceased.

The learned trial Judge held both the appellant and the deceased equally to be blamed for the accident. The appellant being dissatisfied with the decision has now appealed. The only issue involved relates to the question of liability. The quantum of damages will be decided later.

It was alleged that the collision between the two vehicles occurred on the hump-bridge, somewhere in the middle of the road, and that the motor lorry was trying to overtake a bicycle proceeding towards the hump of the bridge and travelling at about 30 m.p.h. It was conceded by the learned counsel for the respondents that just prior to the accident the motor lorry was not overtaking the bicycle, but the appellant was paying more attention to the bicycle in front of him than the road.

The sole question was whether the lorry was travelling on its proper side of the road when the accident happened. It was submitted that the learned Judge came to a wrong finding on the facts when he concluded that the lorry was in the process of overtaking the bicycle and in doing so went to its right slightly over the centre of the road as it was travelling faster than the bicycle. It was at this stage that a collision occurred between the lorry and the oncoming car which skidded when it moved to the centre of the road. It was not clear why the car skidded, but he accepted the evidence of the only

witness for the plaintiffs (P.W.1) who was a passenger in the said car at the material time, that the deceased applied the brakes when he saw the defendant's lorry coming towards him and as a result the car skidded. In accepting the evidence of P.W.1, the learned Judge failed to consider that P.W.1 made a police report about ten days after the accident. According to P.W.1, he was not warded at the General Hospital, Taiping, but returned to his house at Butterworth where he resumed work. He lodged the report on the request of the manager of the workshop where he was working after discussing the accident with him. He was an interested party and had sufficient time to think over the matter.

The learned Judge rejected the evidence of four witnesses including the appellant who appeared for the defence. In doing so, it was submitted that he has failed to test their evidence with the mute evidence, *viz.* the sketch plan, the photographs and the police reports. He rejected the evidence of the appellant on the ground that he was paying more attention to the bicycle in front of the lorry instead of paying attention to the oncoming traffic. The Judge was of the view that the appellant was trying to absolve himself from blame for stating that he was travelling on his side of the road when the collision occurred.

Two of the witnesses, namely the driver of motor car PJ 9270 (D.W.2) which was following the car driven by the deceased and the driver of a taxi which was following the appellant's lorry when the collision occurred (D.W.3), stated that the deceased's car encroached into the path of the lorry which was travelling on its correct side of the road. According to D.W.2, the deceased's car overtook his car about sixty feet away from the bridge and skidded before colliding with the lorry. Both D.W.2 and D.W.3 were independent witnesses who saw the accident and lodged reports on the same day after the accident. We fail to find any valid reason for the learned Judge to reject their evidence merely on the ground of minor discrepancies and for failing to mention something in their reports. In our view, the reports must be tested with the sketch plan, the key to the sketch plan and the photographs. A scrutiny of the sketch plan and photographs reveal that the lorry came to a stop on its correct side of the road (photograph F on page 77 of the Appeal Record) and the damage appears to be a dent on the off-side mudguard of the trailer (photograph G on the same page). The deceased's car came to a stationary position across the centre white line of the road, facing diagonally towards the direction of Penang. Photograph H on page 78 of the record shows its off-side from the front to the rear badly damaged. Apart from the two vehicles, there were two other vehicles on the road, *viz.* the taxi and motor car PJ 9270 driven by D.W.3 and D.W.2 respectively. Their vehicles too were damaged. The taxi was standing stationary some distance away behind the lorry on its correct side of the road. Its off-side appeared to be badly damaged. (See photo I on page 78 of the record). The car driven by D.W.2 was lying on the other side of the road facing diagonally towards Penang. The damage to it appeared to be also on the off-side. From photographs marked A, B, C and D, it can be clearly seen that the deceased's car was sandwiched between the taxi and the car. How they came to end up in that mess was unfortunately not considered by the trial Judge. Had he accepted the evidence of D.W.2 and D.W.3 and weighed them with other relevant evidence, he would have concluded that the deceased's car was travelling at a speed before ascending the hump-bridge and after overtaking D.W.2's car, skidded and encroached into the path of the lorry, thereby colliding with the rear off-side mudguard of the trailer. It then proceeded on to knock into the taxi driven by D.W.3 which was travelling behind the lorry on its correct side and thereafter the deceased's car made a 'U' turn towards the direction from where it was coming, and collided into the car driven by D.W.2.

We are of the opinion that the omission by the trial Judge to consider this evidence is fatal to the defence thereby rendering his conclusion that the appellant was fifty percent to blame for the accident being against the weight of the evidence. In normal cases, the appellate court is reluctant to interfere with the Judge's conclusion on the facts because as a trial Judge he has the opportunity to see and hear the witnesses and is in a better position to weigh their evidence. In the present appeal, however, he has failed to make proper use of this opportunity and has come to a wrong conclusion on the facts which in the circumstances necessitate this Court to interfere and prevent a miscarriage of justice. It is clear to us that the lorry was at the material time travelling on its correct side of the road. The appellant had to keep to his side while following the slow moving bicycle in front as it was approaching the hump which probably concealed his view of oncoming traffic for a while. All he could do in the circumstances was to pay attention to his side of the road ahead and not to overtake the bicycle until it was safe to do so.

As regards the deceased, it was obvious from

the evidence stated earlier that he was driving the car at a fast speed and lost control of it after it had skidded and in the result collided into three other vehicles and ended up facing the way it came. For these reasons, we allow the appeal, set aside the judgment of the Court below and substitute with an Order that the appellant was not liable for the accident.

Appeal allowed.

Solicitors: *Chooi & Co. ; Gurdip & Co.*

MOHAMED BIN OTHMAN & ANOR. v. ABDUL SHATTAR BIN ABDUL RAHIM & ORS.

[S.C. (Salleh Abas L.P., Syed Agil Barakbah & Wan Hamzah S.C.JJ.) May 14, 15, November 10 & December 13, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 343 of 1985]

Company Law – Sale of shares in a private company – Application for specific performance – Whether there was a valid contract – Whether there was notice of transfer of shares – Whether Secretary had authority to offer shares for sale – Summary judgment – Appeal – Leave to file cross-appeal – R.H.C. 1980, O. 81 – Rules of the Supreme Court, 1980, r. 52(3).

Practice and Procedure – Specific performance – Summary judgment – Appeal – Leave to file cross-appeal – R.H.C. 1980, O. 81 – Rules of Supreme Court, 1980, r. 52(3).

The appellants and the respondents were shareholders in a private company. The former owned 32% of the shares and the latter had a total of 51% of the shares. The respondents authorised the first respondent to negotiate the sale of all their shares in the company to the highest bidder. The first respondent in turn authorised the secretary of the company to make offers to the existing shareholders to purchase all the said shares. The secretary accordingly sent out letters of offer. The appellants received the letter from the secretary to the effect that the respondents had decided to sell their 51% shares at $17/- per share. The appellants accepted the offer to purchase all the said shares and informed the secretary by letter. The secretary communicated this to the respondents but the respondents subsequently refused to effect the sale of the shares. The appellants filed a writ claiming specific performance, damages for breach of contract, injunction and other reliefs.

The three issues to be considered in this case were

(1) whether there was a valid and enforceable contract between the parties for the purchase of the respondents' 51% shares;

(2) whether there was a notice of transfer of the shares as required under Article 34 of the Company's Articles of Association,

(3) whether the secretary was acting on his own or in the name of the company in offering the said shares for sale.

The learned trial judge heard the application in chambers and allowed it but subsequently after hearing in open court, he dismissed it. The learned trial judge held that the letter written by the first respondent to the secretary of the company was a transfer notice as required by Article 24(b) of the Company's Articles of Association and with that notice the company became his agent for the sale of the shares. The learned trial judge however held that the secretary had no power to act for the company in respect of the sale of the respondents' shares on the ground that he had no authority to write the letters of offer to the appellants and the letter to the first respondent and in doing so he was acting *ultra vires* the Articles of Association. The learned trial judge therefore held that there was no valid and enforceable contract for the sale of the shares and he dismissed the plaintiffs-appellants' application. The applicants appealed.

Held, by a majority (Wan Hamzah S.C.J. dissenting): (1) the learned trial judge was correct in holding that the letter written by the first respondent to the secretary of the company was a transfer notice as required by Article 34(b) of the Company's Articles of Association;

(2) in this case according to the relevant records the secretary was acting on the orders of the company with full authority based on the resolution of the Board of Directors. In furtherance of the authority given, the offer of sale was sent out to the shareholders including the appellants by the secretary in his capacity as the secretary of the company and not on his own behalf. In other words he was acting on behalf of the company and what he did was to carry out the decision of the Board;

(3) the letter of offer was accepted by the appellants to buy the said shares. A contract was therefore formed;

(4) there were no other triable issues and the evidence before the learned Judge was sufficient for him to come to a decision. The appeal should be allowed and an order for specific performance made;

(5) since it was the fault of the respondents the appellants are not bound to pay interest and for the same reason the appellants are entitled to the profits earned by the company.

[*Editorial Note:* Wan Hamzah S.C.J. in his dissenting judgment said that in his opinion all the issues in the case have to be tried before it can be finally determined whether the appellants are entitled to specific performance. Many of the issues cannot be disposed of fairly merely on affidavit evidence. In order that justice be done the parties should be given a chance to call witnesses if they wish and to examine or cross-examine the deponents of the affidavits and the writers of the documents produced. He therefore held that the defendants-respondents should have unconditional leave to defend].